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No. 04-142

In The

Supreme Court of the United States

October Term, 2004

EVANDRO S. SANTINI, *et al.*,

Petitioners,

v.

CONNECTICUT HAZARDOUS WASTE MANAGEMENT SERVICE,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals For The Second Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS AS AMICUS CURIAE IN SUPPORT OF THE PETITIONERS

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BRIEF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS AS AMICUS CURIAE IN SUPPORT OF THE PETITIONERS

The National Association of Home Builders ("NAHB") has received the parties' written consent to file this brief as *amicus curiae* in support of the petitioners and has filed the letters of consent with the Clerk of the Court.[1]

THE NAHB'S INTEREST ARISES FROM ITS MEMBERS' CONCERNS AS TO THEIR ABILITY TO RECOVER FOR THE INJURY SUFFERED BY THEM WHEN THEIR LAND IS MADE UNUSABLE FOR SOME PERIOD OF TIME

The NAHB represents over 215,000 builder and associate members throughout the United States. Its members include people and firms that construct and supply single family homes as well as apartment, condominium, commercial and industrial builders, land developers and remodelers. It is the voice of the American shelter industry. It is, therefore, concerned with any judicial decision that calls into question the protection provided to landowners when, as in the case at bar, a court holds that the injury suffered by a landowner whose land is effectively sterilized for some period of time cannot possibly result in a compensable taking.

The NAHB has appeared before the Court as an *amicus curiae* or as "of counsel" to the landowners in a number of cases involving the rights and remedies of landowners who have been adversely affected by governmental actions. These include *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981); *Williamson*

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1 No counsel for any of the parties authored any part of this brief. No person or entity other than the NAHB has made any monetary contribution to the preparation or submission of this brief.

County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987);[2] *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687 (1995); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002); *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs*, 537 U.S. 99 (2002); *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188 (2003); *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 124 S. Ct. 1537 (2004).

SUMMARY OF THE ARGUMENT

Past statements by this Court set forth competing policies that only this Court can reconcile. Lower federal and state courts are hopelessly confused as how to apply these policies. This Court's grant of *certiorari* and review of the case at bar will have a widespread effect on situations involving eminent domain and, beyond that, on the allocation of the burdens resulting from governmental actions which renders land unusable for some period of time.

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2 The Court's opinion cited the NAHB's brief. 483 U.S. at 840.

ARGUMENT

I.

THE COURT'S PREVIOUS STATEMENTS CONCERNING THE BURDEN A LANDOWNER SHOULD BE REQUIRED TO BEAR PRESENT COMPETING POLICIES THAT ONLY THIS COURT CAN RECONCILE

Stripped to its essentials, the facts underlying the decision by the Court of Appeals in the case at bar involves a complete loss of use of the property owned by Mr. Santini and his company for 24 months while planning went on to determine whether the site should be acquired by the Connecticut Hazardous Waste Management Service using its power of eminent domain. This Court has made a number of statements over the years which arguably apply.

- "A reduction or increase in the value of property may occur by reason of legislation for or the beginning or completion of a project. Such changes in value are incidents of ownership." *Danforth v. United States*, 308 U.S. 271, 285 (1939).

- "It is the owner's loss, not the taker's gain, which is the measure of the value of the property taken." *United States v. Causby*, 328 U.S. 256, 261 (1946).

- "The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

- "Appellee argues that requiring compensation for denial of all use of land prior to invalidation is inconsistent with this Court's decisions in *Danforth v. United States* and *Agins v. Tiburon*....

  "But these cases merely stand for the unexceptional propositions that the valuation of property which has been taken must be calculated as of the time of taking, and that depreciation in value of the property by reason of preliminary activity is not chargeable to the government." *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 319–320 (1987) [citations omitted].

- "In our view the answer to the abstract question whether a temporary moratorium affects a taking is neither 'yes, always' nor 'no, never;' the answer depends upon the particular circumstances of the case." *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 321 (2002) [footnote omitted].

The foregoing statements – contradictory on the facts before the Court – illustrate the truth of Justice Holmes's statement in his dissent in *Lochner v. People of the State of New York*, 198 U.S. 45, 76 (1905):

> "General propositions do not decide concrete cases. The decision will depend on a judgment or intention more subtle than any articulate major premise."

As a corollary, the statements in every opinion are meaningful only in the context of the factual situation which gives rise to them.

> It is a maxim not to be disregarded, that general expressions, in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control when the very point is presented for decision. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821).

Chief Justice Marshall's statement in *Cohens* and Justice Holmes's in *Lochner* are particularly appropriate in the case at bar given the repeated references to *Danforth* which involved a farm which was physically unaffected by Congress's authorization of the acquisition of flowage easements. *Danforth v. United States*, 105 F.2d 318, 139 (8th Cir. 1939).

Given the very different factual situations in the case at bar and in *Danforth*, this Court's grant of *certiorari* and subsequent review would go a long way toward reconciling the competing policies quoted above.

II.

STATE COURTS ARE, LITERALLY AND FIGURATIVELY, ALL OVER THE MAP ON HOW TO DEAL WITH ISSUES INVOLVING CONDEMNATION

The analysis provided by the Second Circuit, relying as it does upon this Court's statements in *Danforth* and *Agins*, actually raises a *per se* rule that any planning action, regardless of its duration or impact on the landowner, does not result in a compensable taking. (App. at 23a–27a.) As such, it contradicts this Court's statements in *Causby* and *Tahoe-Sierra*. This, by itself, is enough of a reason for this Court to grant its writ of *certiorari*.

The Second Circuit's decision in the case at bar does not exist in a vacuum. In fact, the law involving both the extent of the power of eminent domain and the effect of

temporary takings is in a state of flux unmatched since this Court's decision in *Berman v. Parker*, 348 U.S. 26 (1954). Thus, for example, state courts, interpreting both their own and the federal Constitutions, as well as this Court's decisions, have come to very different conclusions in the very recent past. For instance, three recent cases have held that governmental agencies did not have the power to condemn one person's private property and transfer it to another merely because of the economic benefits which would accrue to the larger community. *County of Wayne v. Hathcock*, 2004 WL 1724875 (Mich. July 30, 2004); *Bailey v. Myers*, 76 P.3d 898 (Ariz. Ct. App. 2003); and *Southwestern Illinois Development Authority v. National City Environmental, L.C.C.*, 768 N.E.2d 1 (Ill. 2002).

On the other hand, other recent cases have specifically upheld just this type of action. *Kelo v. City of New London*, 843 A.2d 500 (Conn. 2004); and *DUWA, Inc. v. City of Tempe*, 52 P.3d 213 (Ariz. Ct. App. 2003).

Contrary to the holding in the present case by the Second Circuit, other recent cases have held that pre-condemnation actions, if bad enough, can result in a compensable taking. *Merkur Steel Supply, Inc. v. City of Detroit*, 680 N.W.2d 485 (Mich. Ct. App. 2004); and *Johnson v. City of Minneapolis*, 667 N.W.2d 109 (Minn. 2003). This is, of course, not a new phenomenon. *See, e.g., Foster v. City of Detroit*, 405 F.2d 138 (6th Cir. 1968).

In an analogous situation, a number of State Supreme Courts have imposed a *per se* rule that invalid regulation, successfully invalidated through litigation, cannot result in a taking. *Torromeo v. Town of Fremont*, 813 A.2d 389 (N.H. 2002), *cert. denied*, 539 U.S. 923 (2003); *Pheasant Bridge Corp. v. Township of Warren*, 777 A.2d 334 (N.J. 2001), *cert. denied*, 535 U.S. 1077 (2002); *Sea Cabins on the Ocean IV Homeowners Association, Inc. v. City of North Myrtle Beach*, 418 S.E.2d 595 (S.C. 2001); and *Landgate, Inc. v. California Coastal Commission*, 953 P.2d 1188 (Cal.), *cert. denied*, 525 U.S. 876 (1998).

Although presented in different contexts, all of the foregoing cases have in common situations where a landowner is unable to do anything with his or her land for some period of time because of actions taken by a governmental agency attempting to further the public welfare. Regardless of the factual differences, each presents a question of when fairness requires that society at large, rather than a single landowner, should bear the cost of governmental actions. This Court's grant of *certiorari* and subsequent review in the case at bar would go a long way to providing guidance to lower courts, both state and federal, as to how the question should be answered.

CONCLUSION

The NAHB's reading of this Court's opinion in *Tahoe-Sierra* is that planning is a good thing, that the delay associated with planning cannot result in a *per se* compensable taking and that the multi-factor analysis called for by *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), applies in similar circumstances. However, the NAHB is concerned that a number of courts – federal as in the case at bar and state as cited above – are of the opinion that there is something special about the planning associated with the exercise of the power of eminent domain which should insulate it from any possibility of a taking occurring. Given the existence today of cases trying to make sense of this Court's pronouncements, gleaned from different cases having different facts decided at different times, the NAHB believes that the case at bar provides a perfect vehicle for this Court to explain that it really intended to have each case looked at on its merits when a planning delay – whether in a prosaic land use situation or an exotic eminent domain case – is presented to the courts, both federal and state.

Accordingly, the NAHB respectfully requests that the Court grant the petition for a writ of *certiorari* requested by the petitioners.

DATED: August 30, 2004 Respectfully submitted,

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